IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

BEACON MILLING COMPANY, INC., *Petitioner,*

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Monroe County (ff. 25-33) is not officially reported.

The Appellate Division, Fourth Judicial Department, handed down no opinion. (ff. 80-81) See Mem., 266 N. Y. A. D. 708.

The opinion of the Court of Appeals of the State of New York is reported as *New York Central Railroad Company,* v. *Beacon Milling Company, Inc.,* 293 N. Y. 218, decided July 19, 1944.

The Jurisdiction of This Court.

Jurisdiction of this Court is found in U. S. C. A., Title 28, Sec. 344 (b), and particularly in those provisions reading:

> "It shall be competent for the Supreme Court by certiorari, to require that there shall be certified to it for review and determination with the same power and authority and with like effect as if brought by writ of error, (or appeal) any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any * * * statute of, or * * * authority exercised under, the United States; and the power to review may be exercised as well where the Federal claim is sustained as well as where it is denied. * * *"

Statement.

Beacon Milling Company, Inc. (hereinafter called Beacon) is a New York corporation which is engaged in the manufacture of animal and poultry feeds, sometimes called mixed feeds, at Cayuga, N. Y. Its manufacturing plant at that point has direct side-track connection with The New York Central Railroad Company (hereinafter called New York Central) and through the latter is indirectly connected with Lehigh Valley Railroad Company.

In the manufacture of animal and poultry feeds Beacon uses large quantities of many raw materials, principally, however, grain, grain products, and grain by-products. These are generally purchased in the south and west and are transported to Cayuga by railroad, deliveries being made by the two railroads serving the plant. The markets for the manufactured feeds are mainly east and south of Cayuga, and shipments from that point are made by the same two railroads.

In its relation to the railroads and their transportation service Beacon's Cayuga plant operates on what is commonly referred to as a "transit" arrangement. Under this, the raw materials are received at Cayuga, are there manufactured, fictionally, "in transit," and the feed is then shipped from Cayuga, all as a through transportation service from original point of shipment of the raw material, via Cayuga, to final destination of the manufactured product. In these circumstances there arises the important question of what rates are applicable to that through service to determine the amount of the charge for transportation.

For many years after Beacon began operating at Cayuga, the rail carriers assessed charges for their transportation service on the basis of the rate from original point of shipment of the raw material to final destination of the mixed feed applicable on the outbound feed. To instance, if an outbound shipment of feed from Cayuga to Wilmington, Del., were supported in the transit account by an inbound shipment of corn from Chicago to Cayuga, then the charge for the through transportation, Chicago to Wilmington was computed on the basis of the rate applicable on mixed feed from Chicago to Wilmington.

The lawfulness of this practice of the carriers was raised by Beacon before the Interstate Commerce Commission. That body, on October 10, 1929, in *Beacon Milling Co.* v. *New York Central R. Co.*, 157 I. C. C. 635,—*the Beacon case*, —found that the carriers' "transit rules, regulations and practices in their application to grain, grain products, and grain by-products * * * were, are, and for the future will be unjust and unreasonable, and that the application of these unlawful rules and practices has resulted and will result in the collection or assessment of charges for the through transportation from points of origin to final destination that were, are, and for the future will be unreasonable * * *." (page 640)

Contemporaneously, the Commission entered its usual cease and desist order, and further required the carriers, effective on or before December 30, 1929, to

> " establish * * * and thereafter to maintain and apply transit rules, regulations and practices with respect to the transportation of grain, grain products and grain by-products from points in central, southern and western territories to Cayuga, N. Y., there manufactured into mixed feed and shipped to destinations in eastern territory and New England,"

in compliance with the findings in the Commission's report, page 640 (ff. 38-45).

This order of October 10, 1929, further provided that it should "continue in force until the further order of the Commission." (f. 45) It remained in full force and effect throughout the period of this controversy, April 18, 1935-December 31, 1936. The gist of the order was that from and after December 30, 1929, charges for transportation service from original point of shipment of the raw material to final destination of the mixed feed should be computed on the basis of the through rate applicable on the inbound raw material. Specifically, as respects the shipment instanced above, the lawful charges thereafter would be computed on the basis of the rate on corn from Chicago to Wilmington.

The carriers respondent to the Commission's order of October 10, 1929, entered pursuant to its report in *Beacon Milling Co.* v. *New York Central R. Co., supra*, obeyed it. Ever since that time the *normal* charges of the carriers for such transportation of property for Beacon, as distinguished from the so-called *emergency* charges, have been assessed in strict accordance with that order. The trial court so found, and stated (f. 31):

> "It is conceded that the normal freight rates have been computed and paid on the basis of the incoming commodity."

While the order of the Commission in the *Beacon case* (ff. 38-45) was still outstanding and in full force and effect, the Class I railroads of the entire United States filed with the Commission on August 27, 1934, a petition which sought authority to make increases of a general nature in their freight rates and charges. The basis of the petition was revenue necessity, an incident of the then current business depression. There being at that time many outstanding orders of the Commission which required the maintenance of rates and charges at prescribed levels,—and among them the order in the *Beacon case*,—the carriers also asked that the Commission modify such outstanding orders so far as necessary to permit the increases which they were seeking to become effective. The Commission docketed this application of the carriers and the investigation which it then made into the subject on its own motion, as *Ex Parte 115*.

There followed the usual procedure of hearing, etc., and ultimately the Commission denied the relief sought by the Class I carriers but granted authority to make certain emergency increases, saying,—*Emergency Freight Charges, 1935*, 208 I. C. C. 4, 59:—

> "The emergency charges authorized are set forth in detail in Appendix A."

That Appendix A is incorporated in the record now before this court at ff. 49-69.

The order then entered by the Commission to give force and effect to its findings in *Emergency Freight Charges, 1935, supra*, is included in this record at ff. 70-72. To resolve the conflict between that order and outstanding rate orders previously entered by the Commission and in full force and effect, the Commission, in its order entered in connection with *Emergency Freight Charges, 1935, supra*, provided as follows (ff. 71-72):

> "*It is ordered*, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates and

> charges which have or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the emergency charges herein authorized to be applied to the rates and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; *but that in all other respects said orders shall remain in full force and effect unaffected by this order.*" (Italics ours.)

Attention is now directed to the commodities on which the Commission authorized emergency charges and also to the commodities respecting which the Commission declined to authorize emergency charges. Thus, Part 4 of Appendix A (ff. 58-64) in Group 701 (ff. 63-64) authorized an emergency charge of 3 cents per hundred pounds on "Feed, animal or poultry, rated under that heading in consolidated classification." * But the same Appendix A in Part 3 (ff. 56-57) lists the "Commodities, in carloads, on which no line-haul emergency charges are authorized," and among such commodities is substantially the entire grain list (f. 56, Group Numbers 10, 20, 30, 40, 41, 42, 50, 51, 52, 61, 70).

It is this emergency charge on animal or poultry feed which gives rise to the controversy here before the court. The claim of the carriers is that they were authorized to assess an emergency charge on animal or poultry feed by the Commission's report and order in *Emergency Freight Charges, 1935, supra,* and *s. c.*, 215 I. C. C. 439. Beacon admits such emergency charges were authorized but contends that they were inapplicable on its transit shipments. The Commission's order in the *Beacon case* prescribed no specific rates; it prescribed only a rule for the assessment of charges. That rule provided that the charges for the transportation of Beacon's property,—the raw materials into

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* In the subsequent decision in *Emergency Freight Charges, 1935,* 215 I. C. C. 439, 445, the Commission notes that "the maximum charge of 3 cents per 100 pounds on animal or poultry feeds not made wholly of grain was reduced to 1 cent", by voluntary action of the carriers subsequent to the Commission's first decision.

Cayuga, and the animal or poultry feeds from Cayuga,—should be assessed on the basis of the rates applicable on the inbound raw materials. As no emergency charges were authorized by the Commission to be applied on the inbound shipments of grain, grain products, and grain by-products, it follows that no emergency charges were properly assessable under *Emergency Freight Charges, 1935*, on the transportation of Beacon's property. This is particularly so because of the provision of the Commission's order entered in connection with its report in *Emergency Freight Charges, 1935, supra* (ff. 70-72), which is quoted above, and maintained all outstanding orders of the Commisison in full force and effect except to the extent necessary to permit the emergency charges therein authorized to be applied.

Summary of Argument.

The Interstate Commerce Commission in 1929, condemned as unlawful transit rules, regulations and practices then maintained by common carrier railroads with respect to the transportation of Beacon's property in interstate commerce. The Commission prescribed just and reasonable transit rules, regulations and practices to govern in the future. Its orders to that effect were obeyed by the carriers.

In 1935 and 1936, as a means of revenue relief for the carriers, the Commission authorized them to make certain increases of an emergency nature in their rates, on some, but not all commodities. Outstanding and effective orders of the Commission were modified to the extent necessary to permit such emergency increases to be made, but not otherwise. In assumed conformity with the orders of the Commission authorizing emergency increases the carriers, incorporated in their tariffs substantially the identical rule with respect to Beacon's property which had been condemned by the Commission in 1929 as unlawful and relief against which continued in effect by virtue of the orders then issued.

Determination that the carriers, in publishing their emergency increases, violated the orders of the Commission is merely a matter of construction of those orders and of the tariffs issued by the carriers to make the emergency increases effective. Such construction is a question of law to be determined by the courts, no administrative action by the Commission being necessary.

The Court of Appeals of the State of New York misconstrued the orders of the Commission and its action in that respect can be and should be reversed by this Court. The Court of Appeals erred in holding that Beacon's relief was by administrative procedure before the Interstate Commerce Commission. The Court of Appeals has thus denied to Beacon its right, guaranteed by the Interstate Commerce Act, to transportation in interstate commerce at no higher than just and reasonable rates. Such rates have heretofore been fixed and ordered by the Commission.

The principal opinions which are considered by Petitioner as applicable and persuasive with reference to the points argued are:

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285.
Turner, D. & L. Lumber Co. v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259.
Central New England R. Co. v. *Boston & Albany R. Co.*, 279 U. S. 415.
Arizona Grocery Co. v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370.
United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474.
Brown & Sons Lumber Co. v. *Louisville & N. R. Co.*, 299 U. S. 393.
Crancer v. *Lowden*, 315 U. S. 631.

For these reasons a Writ of Certiorari should be granted and this court should review and finally reverse the decision of the Court of Appeals of the State of New York.

ARGUMENT.

I. UNDER THE ORDER OF THE COMMISSION IN THE *BEACON CASE* IT WAS UNLAWFUL FOR THE NEW YORK CENTRAL TO CHARGE, FOR THE CARRIERS' TRANSPORTATION OF BEACON'S PROPERTY IN INTERSTATE COMMERCE, ANY RATES AND CHARGES OTHER THAN THOSE APPLICABLE ON THE RAW MATERIALS RECEIVED AT CAYUGA.

II. THE ORDER OF THE INTERSTATE COMMERCE COMMISSION ENTERED IN CONNECTION WITH ITS REPORT IN THE *BEACON CASE* WAS NOT MODIFIED BY THE ORDERS SUBSEQUENTLY ISSUED IN CONNECTION WITH THE COMMISSION'S REPORTS IN *EMERGENCY FREIGHT CHARGES, 1935*, AND REMAINED IN FULL FORCE AND EFFECT THROUGHOUT THE PERIOD OF THIS CONTROVERSY.

A conclusion with respect to these two propositions involves the court in nothing more than a construction of the Commission's reports and orders in the *Beacon case* and in *Emergency Freight Charges, 1935*. That construction is obviously a proper function for the court, but the construction of the court below is, of course, subject to the power of revision of this court. *Great Northern R. Co.* v. *Merchants Elevator Co., supra*, page 291; *Central New England R. Co.* v. *Boston & Albany R. Co., supra*, page 420.

Before the *Beacon case*, and ever since, the carriers have always maintained in effect rates for the transportation of both the inbound raw materials used by Beacon at Cayuga, and the outbound mixed feed. Prior to the *Beacon case*, they assessed their freight charges for the transportation of Beacon's property on the basis of the rate applicable on the mixed feed from original point of shipment of the raw material to final destination of the mixed feed. This was the subject of Beacon's complaint in that proceeding. The Commission's report and order therein condemned

the carriers' practice and prescribed that for the future the charges for the transportation of Beacon's property should be based upon the rate applicable upon the inbound raw material.

The point to be kept in mind is that no specific rates, in the strict sense of the word, were prescribed by the Commission for future application. There was indeed no attack upon any specific rates in the *Beacon case*. All that was in issue was the basis upon which the charges were assessed and it was only with respect to that issue that the Commission prescribed its rule for the future. As put by the Commission in its order, the carriers were required "to maintain and apply transit *rules, regulations and practices*" (italics ours) with respect to Beacon's property. The specific requirement was that the charges be assessed on the basis of the rates applicable to the transportation of the inbound raw material.

When the carriers subsequently came before the Commission for revenue relief in *Emergency Freight Charges, 1935*, they were seeking increases in rates. The Commission granted an increase on mixed feed; it specifically declined to grant any increase on the inbound raw materials received at Cayuga. There is nothing in the report or in the orders in *Emergency Freight Charges, 1935* which, either specifically or otherwise, modifies on abandons the rule for assessing charges which the Commission laid down in the *Beacon case*.

It follows, therefore, that that rule of the *Beacon case*, laid down to prescribe the basis upon which Beacon should be assessed for the transportation of its property in interstate commerce, thereafter remained in full force and effect and unaffected by the Commission's orders in *Emergency Freight Charges, 1935*.

The gist of that rule was that the charges should be assessed on the basis of the rates applicable on the inbound raw material received at Cayuga. As no emergency increases were authorized to be applied on those raw materials, none could lawfully be applied to the transportation of Beacon's property.

III. THE TARIFF OF RATES AND CHARGES PUBLISHED BY THE NEW YORK CENTRAL IN ASSUMED CONFORMITY TO THE COMMISSION'S ORDERS IN *EMERGENCY FREIGHT CHARGES, 1935*, ACTUALLY WENT BEYOND THE AUTHORITY GRANTED BY THE COMMISSION IN SAID ORDERS TO MAKE EMERGENCY INCREASES IN FREIGHT RATES, AND WAS PUBLISHED IN VIOLATION OF THE COMMISSION'S ORDER IN THE *BEACON CASE*, THEN IN FULL FORCE AND EFFECT.

The orders of the Commission having been construed, and the extent of the carriers' authority to publish emergency increases having been thus determined, there arises the question whether the carriers' tariffs conformed to the orders.

This involves the court in nothing more than the construction of a written document, i.e., the tariff, couched in language which is non-technical, unambiguous, and clear. "The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute,"—see *Brown & Sons Lumber Co.* v. *Louisville & N. R. Co., supra*, page 397, citing *Great Northern R. Co.* v. *Merchants Elevator Co., supra*, page 291.

It is not denied that the New York Central in incorporating in its tariffs the rate increases assumed to have been authorized by the Commission in *Emergency Freight Charges, 1935*, did so publish its rates and charges as to make the emergency increases so authorized with respect to mixed feed applicable to the transportation of Beacon's property. Indeed, the manner of publication of the increases was such that the shipper could not escape them, whether the charges assessed against him were based upon the rates on the inbound raw material, or upon the rates on the outbound mixed feed. This results from the language of the tariff, designated as W. S. Curlett, Agent, I. C. C. No.

A-460 (R. Appendix page 83 *et seq.*) which provided in substance, in its Item No. 70 (R. Appendix 86),—

> *first*, that if the inbound commodity was one on which no emergency charge was authorized, then an emergency charge should be assessed on the basis of that applicable to the outbound manufactured product; and, *second*, that in the event there is an emergency charge authorized on the inbound raw material, then the emergency charge to be assessed shall be that applicable on the outbound manufactured product.

This, in the language of the day, caught the shipper "going and coming." But, as we have already shown under Propositions I and II, such publication was not authorized in any way by the Commission's reports and orders in *Emergency Freight Charges, 1935.*

The consequence is that the rule for the assessment of charges prescribed by the Commission in the *Beacon case* continued to govern the relation of these parties as shipper and carrier. Under that rule, the charges to be assessed for the transportation of Beacon's property were to be based on the inbound raw material. No emergency increases were authorized to be applied to them.

IV. THE SO-CALLED LEGAL RATE PUBLISHED BY THE NEW YORK CENTRAL IN ITS TARIFFS IS NOT BINDING IN THE SHIPPER-CARRIER RELATION OF BEACON AND THE NEW YORK CENTRAL BECAUSE IT EXCEEDS THE LAWFUL RATE AND CHARGE PRESCRIBED BY THE COMMISSION.

That there is a distinction between a legal rate and a lawful rate was definitely recognized by this court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co., supra,* page 384, decided February 4, 1932. It was there pointed out that "the legal rate",—i.e., the rate contained in the carrier's tariff,—"was not made by the statute a lawful rate,—it was lawful only if it was reasonable."

While the test thus mentioned as determinative of the lawfulness of the tariff rate was the administrative test,—whether reasonable under the standards of the Interstate Commerce Act,—its lawfulness may also be determined by the court in cases where that determination requires no administrative action. *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* pages 291-292; *Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co., supra,* pages 261-262; *United States Navigation Co.* v. *Cunard S. S. Co., supra,* pages 481-482; *Brown & Sons Lumber Co.* v. *Louisville & N. R. Co., supra,* pages 397-398; *Crancer* v. *Lowden, supra,* page 636.

But despite this rule, long established and consistently followed, the New York Central insists that the shipper has no relief here save through original complaint before the Interstate Commerce Commission. Summed up, its contention throughout this proceeding has been that regardless of whether or not its tariff publication exceeded the authority granted by the Commission to make emergency increases in rates and charges, once those tariffs were actually published and in effect, the shipper was bound absolutely to pay the rates and charges specified therein, and could have no relief except by proceeding administratively before the Interstate Commerce Commission.

It is entirely fair to say that this position of the carrier is, on the face of things, preposterous. In substance, it is that the carrier can publish anything it chooses in its tariffs, regardless of the Commission's orders issued for the administrative relief of shippers, can require the shippers to pay the rates as published, and can thus drive the shippers repeatedly to the Interstate Commerce Commission for additional administrative relief.

The law is to the contrary. When the statutes, as they do, give full force and effect to tariff rates and charges, it is only *lawful* tariff rates and charges that are so dignified. This was clearly recognized by the Interstate Commerce Commission in an early case, *Nashville Traffic Bureau* v.

L. & N. R. R. Co., 53 I. C. C. 37, decided April 12, 1919, where the Commission at page 38 said:

> "To the extent that it was duly published and filed in conformity with the requirements of the sixth section of the regulating statute, the rate here assailed was not lacking in legal qualities. Nevertheless, from July 1, 1917, to August 4, 1917, it was published and filed in contravention of the outstanding order entered March 13, 1917, in *Traffic Bureau of Nashville* v. *L. & N. R. R. Co., supra.* To say that such an order may be defeated merely by the publication and filing of a rate higher than that prescribed by the order is to say also that the shipping public is not entitled to the protection of this Commission's orders during the period they are in force. Clearly the statute does not contemplate any such a result."

That very sensible rule has been followed by the Commission with consistency. It is the rule of the Supreme Court of Ohio, laid down with respect to state commerce. *Cleveland, C. C. & St. L. Ry. Co.* v. *Mills Bros.*, 101 O. S. 173; *Pennsylvania R. Co.* v *Public Utilities Commission*, 130 O. S. 469. Note also the *discussion of Wight* v. *United States*, 167 U. S. 512, in this court's decision cited *Mitchell Coal & C. Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 260-261.

V. THE DECISION OF THE COURT OF APPEALS DENIES TO BEACON THE RIGHT TO TRANSPORTATION OF ITS PROPERTY BY COMMON CARRIERS IN INTERSTATE COMMERCE AT NO HIGHER THAN JUST AND REASONABLE RATES AND CHARGES, AS GUARANTEED BY THE INTERSTATE COMMERCE ACT, Section 1 (5) (a).

Section 1, (5) (a) of Part I, Interstate Commerce Act, provides as follows (U. S. C. A., Chap. 1, Sec. 1(5):

> "All charges made for any service rendered or to be rendered in the transportation of passengers or

> property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

This is a guaranty to the shipping public that transportation of its property shall be had at rates which are no more than just and reasonable. By the administrative act of the Interstate Commerce Commission in the *Beacon case* it was determined that the just and reasonable charges for the transportation of Beacon's property shall be those determined by the application of the rates in effect on the inbound raw materials received at Cayuga. That protection for Beacon as a shipper was secured to it by the Commission's order prescribing transit rules, regulations and practices for the future with respect to the transportation of its property in the *Beacon case*. The order so prescribing those rules, regulations and practices was obeyed by the carriers and was in full force and effect throughout the period of the controversy here before the court.

The trial court expressly found (f. 31):

> "It is conceded that the normal freight rates have been computed and paid on the basis of the incoming commodity,"

and added:

> "It is impossible, at the same time, to hold that emergency charges can be levied for the entire haul on the basis of the outgoing commodity."

Yet that is precisely what the carrier insists upon doing,—the anomalous thing of assessing normal charges upon one basis, and emergency charges upon another basis, for an identical transportation service. Moreover, the basis upon which the carrier assumes to assess the emergency charges is one condemned by the Commission in the *Beacon case* as unlawful.

The action of the Court of Appeals of the State of New York, therefore, is nothing less than a denial of Beacon's right to the transportation of its property by common carriers in interstate commerce at not more than just and reasonable rates and charges.

VI. JUST AND REASONABLE RATES AND CHARGES FOR THE TRANSPORTATION OF BEACON'S PROPERTY HAD BEEN DETERMINED BY THE COMMISSION IN THE *BEACON CASE;* BEACON'S RIGHTS WITH RESPECT THERETO HAD BEEN FULLY PROTECTED BY THE COMMISSION BY ITS ORDER PRESCRIBING THE RULE TO GOVERN THE ASSESSMENT OF CHARGES IN THE FUTURE; AND BECAUSE THAT ORDER REMAINED IN FULL FORCE AND EFFECT THROUGHOUT THE PERIOD OF CONTROVERSY THERE IS NO REASON WHY BEACON SHOULD AGAIN SEEK ADMINISTRATIVE RELIEF FROM THE COMMISSION.

The final conclusion of the Court of Appeals is that Beacon may proceed to an assertion of its rights in this controversy before the Interstate Commerce Commission and endeavor there to obtain administrative relief. Such procedure is unnecessary, the point here at issue being one of law, to be determined by the construction of written documents.

The law has been long settled and is well settled in this respect. The leading case is *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* decided May 29, 1922. There, as here, the carrier's contention was that courts are without jurisdiction of cases involving a disputed question of tariff construction unless there had been preliminary resort to the Commission. Denying this, the court said (p. 290);—

> "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law;

and added that (p. 291),—

> "But what construction shall be given to railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

Among the more recent cases holding to the same rule there may be cited *Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co., supra; Central New England R. Co.* v. *Boston & Albany R. Co., supra; United States Navigation Co.* v. *Cunard S. S. Co., supra; Brown & Sons Lumber Co.* v. *Louisville & N. R. Co., supra; Crancer* v. *Lowden, supra.*

The *Brown & Sons Lumber Co. case* is of particular interest and significance. Speaking with reference to the carrier's tariffs the court there said (pp. 397-398):

> "The language used is not technical. The meaning of the words is clear. There is no ambiguity. The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute. Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285, 291. As, in each instance, there was available some through route from point of origin to destination for which joint through rates had been published, the rule, by its terms, has no application. *We so hold despite the construction given to the rule by the Commission.*" (Italics ours)

Thus it appears that although the Commission has concurrent jurisdiction of the question of law, sufficient to authorize it to consider and determine the question in the first instance, the final determination is for the court. Exercising its final say, the court reversed the Commission's construction of the tariff in question in the *Brown & Sons Lumber Co. case.*

The only question that could be raised in further proceedings before the Commission respecting this controversy

is the identical question that was raised in the *Beacon case*, and was there determined by the Commission. To be sure, the shipments with respect to which the Commission spoke in the *Beacon case* were not the identical shipments here involved. But the transportation service is identical. As respects that transportation service and the charges lawfully to be assessed by the carriers therefor, the Commission has already spoken concerning the normal charges. Concededly they were assessed in strict accordance with the order in the *Beacon case* throughout the period of this controversy.

We are here, then, on all fours with the determination of this court in *Crancer* v. *Lowden, supra.* There, the Commission, with respect to other shipments, had previously determined the administrative issue. The court relied upon that administrative determination because the question before it with respect to later shipments was "virtually the same question" as the Commission had previously decided. (page 635)

Conclusion.

Beacon Milling Company, Inc., Petitioner, therefore respectfully submits that this case is one calling for the exercise by this Court of its supervisory powers in order that Petitioner's constitutional and statutory rights may be protected, and that accordingly a Writ of Certiorari should be granted and this court should review the decision of the Court of Appeals of the State of New York and finally reverse it.

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